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No. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

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QUESTION PRESENTED

The American Bar Association will address the following question:

What is the appropriate standard for granting a stay of execution to a death-sentenced federal habeas corpus prisoner pending disposition by a federal Court of Appeals of his initial appeal.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active interest in the improvement of the administration of justice.

The ABA appears as *amicus curiae* in this cause to address a serious procedural question with important implications for the administration of justice in the federal courts: the proper standards governing stays of executions pending initial appeal in habeas corpus cases. We wish to make clear that we do not enter this case to support or to oppose, expressly or implicitly, a penalty of death. This Association has not formally addressed capital punishment either as a constitutional question [1] or as a social policy.

Rather, our concern is that standards governing so fundamental a procedural issue as the administration of stays pending an initial appeal in capital cases should be decided only after a careful examination of the statutory authority, the prior practice, and the policy considerations bearing on the issue. Our own examination of these matters has convinced us that the correct standard is the one set forth in the body of this brief.

Both parties have consented to the filing of this *amicus curiae* brief.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We adopt the statement of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved set forth in Petitioner's Brief.

STATEMENT OF THE CASE

Only the procedural history of this case is pertinent to the issue the ABA will address; that history is summarized below. Otherwise, the ABA adopts the Statement of the Case as set forth in Petitioner's Brief.

Petitioner Thomas Barefoot was convicted on November 21, 1978, in the 27th Judicial District Court for Bell

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[1] The constitutionality of the death penalty *vel non* has of course been resolved in *Gregg* v. *Georgia*, 428 U.S. 153, 168-187 (1976).

County, Texas, of the murder of Carl Levin, a Harker Heights, Texas, police officer. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence, and also denied a motion for rehearing. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). On June 29, 1981, this Court denied a petition for a writ of certiorari. *Barefoot* v. *Texas*, 453 U.S. 913 (1981). Petitioner thereafter filed a state habeas corpus petition in the District Court for Bell County, which denied the petition without a hearing, and the Texas Court of Criminal Appeals affirmed.

Having exhausted his federal constitutional claims, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, raising at least four constitutional claims in his habeas petition.[2] After an evidentiary hearing, the District Court denied the petition in an order and judgment entered November 12, 1982. The District Court, at the request of the State of Texas, vacated its earlier stay of execution in an order entered December 8, 1982; however, on application of petitioner, *the District Court granted a certificate of probable cause*, pursuant to 28 U.S.C. § 2253, on December 10, 1982.

On December 20, 1982, the 27th Judicial District Court for Bell County, over petitioner's objection, entered an order scheduling petitioner's execution for January 25, 1983. Petitioner moved in the Texas Court of Criminal Appeals on December 20, 1982, to stay his execution. The Court of Criminal Appeals entered an order the next day denying the stay, but failed to notify counsel for petitioner of its ruling until two weeks later. Petitioner renewed his motion for a stay in the Court of Criminal Appeals on January 10, 1983, and that court denied the renewed motion the following day.

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[2] The petition was initially filed in the Western District of Texas, Austin Division, but was transferred to the Waco Division for filing by an order of the District Court.

Three days later, on January 14, 1983, petitioner filed an application for a stay of execution pending appeal in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals scheduled oral argument on the application five days hence. The argument was originally set to be held before a panel consisting of Judges John R. Brown, Thomas M. Reavley, and E. Grady Jolly. When Judge Brown became ill on the morning of the argument, Judge Carolyn D. Randall was substituted. Judge Reavley informed counsel in open court prior to argument that Judge Randall had not seen any of the papers which had been filed. Moreover, no members of the panel had been provided by the State of Texas or by the Clerk of the District Court with either (i) the 1400-page state trial transcript or (ii) the 260-page federal habeas corpus transcript prior to argument. Nevertheless, on the day following the argument, the Court of Appeals entered a 16-page order denying a stay of execution.

Addressing the standard governing its decision whether to issue a stay, the Court of Appeals noted that it must "consider the likelihood of success" of Barefoot's appeal in making the decision whether to stay his execution, and that "[t]here should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below." Slip op. at 4. In this regard, the District Court's issuance of a certificate of probable cause should be given " 'weighty consideration' " by the Court of Appeals (slip op. at 4, quoting *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967) (per curiam)), but the Court of Appeals was obliged independently to assess the merits of petitioner's claims. Slip op. at 4 & n.2.

The court did consider and reject petitioner's suggestion that the grant by the District Court, pursuant to 28 U.S.C. § 2253, of a certificate of probable cause to appeal necessarily required that a stay of execution be

granted.[3] The Court of Appeals acknowledged that a similar position had been taken by three members of this Court in *Brooks* v. *Estelle*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982) (Brennan, Marshall & Stevens, J.J., dissenting from the denial of a stay), but concluded that "since six members of the Court denied the petition for stay [in *Brooks*], this argument must have been rejected." Slip op. at 5. Finally, the Court of Appeals distinguished this case from *Nowakowski* and *Garrison* v. *Patterson*, 391 U.S. 464 (1968) (per curiam), on the ground that, because the petitioner had an opportunity to brief and argue the merits of the underlying issues, the case was controlled by *Carafas* v. *LaValle*, 391 U.S. 234 (1968). Slip op. at 5-6. In its opinion, the Court of Appeals neither mentioned nor considered the statute, 28 U.S.C. § 2251, authorizing stays of execution in habeas corpus cases.

Petitioner filed an application for a stay of execution with this Court, and the Court entered an order staying petitioner's execution, and granting certiorari to consider

> the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also, the issues on the appeal before the United States Court of Appeals for the Fifth Circuit. [*Barefoot* v. *Estelle*, 51 U.S.L.W. 3563 (U.S., Feb. 1, 1983) (No. 82-6080).]

SUMMARY OF ARGUMENT

A review of the standards for issuance of stays that prevail in other Courts of Appeals—as well as the standards which have guided this Court's decisions in analogous contexts—compels the conclusion that the correct stand-

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[3] Petitioner had argued that such a certificate is granted only upon the finding of " 'a substantial showing of the denial of [a] federal right.' " *See Stewart* v. *Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972).

ard to be applied in this case is different from the one apparently adopted by the Fifth Circuit.

The pertinent statutes, 28 U.S.C. §§ 2251 & 2253, do not explicitly endorse the Fifth Circuit's standard. In fact, the text and legislative history of these provisions at least implictly support the position advanced by the ABA —that is, a condemned prisoner ought to receive a stay of execution and a full review of his claims pending the disposition of his initial habeas corpus appeal once a certificate of probable cause has been issued, unless the prisoner's claims are frivolous, such as where they are legally and squarely controlled by recent decisions of this Court, where it can quickly and incontrovertibly be determined on the face of the record that the legal questions raised have no basis in fact, or where they are obviously and totally without merit even if supported by the record.

Turning from considerations of precedent to those of policy, we submit that the standard adopted by the Fifth Circuit would appear to guarantee that serious, disruptive burdens will routinely be placed on those Justices, judges, clerks and others involved in the administration of justice in the Courts of Appeals and in this Court. Frantic telephone calls and hurried judicial conferences will constitute an unnecessary, indeed an unseemly, atmosphere in which to resolve difficult constitutional questions that might better be addressed in the orderly fashion which characterizes other appellate litigation in the federal system.

In addition to the burdens placed on the federal courts, a failure to adopt the standard we propose will, we believe, make incalculably more difficult the often thankless task faced by volunteer attorneys who have agreed to represent penniless, death-sentenced inmates in federal habeas proceedings. Summary procedures that deprive counsel—even those armed with a certificate of probable cause to appeal—of a minimally adequate period in which

to brief and argue a client's case are likely to impair the effectiveness of all but the rarest or most well-financed of attorneys.

Finally, it is critically important to underline that these summary procedures will govern *capital* appeals, where life or death is quite literally at stake. This Court has long held, of course, that capital cases must be viewed under the Eighth Amendment as qualitatively different from cases involving any lesser punishments, and the Court has expressly conditioned its approval of capital punishment upon the assurance of standards for a constitutional death penalty that will serve the goals of measured, consistent application and fairness to the accused. The Court's wise requirement of the utmost procedural care in capital cases would be seriously compromised by tolerance of a system under which the rushed or truncated adjudication of death-sentenced inmates' initial federal appeals becomes the norm.

There are no contrary interests of the States which weigh heavily in the balance. Executions quite obviously are destined in this country to resume in some numbers in the near future. The provision of stays and the granting of normal appellate review to capital inmates will not thwart this development. At most, capital inmates will live a few additional months while their federal constitutional claims receive careful review from the federal appellate courts. Given the absence of any evidence that the federal courts have been plagued with frivolous appeals—by our count, 22 of the 37 capital cases which have been reviewed by Courts of Appeals since 1976 have contained constitutional errors serious enough to require reversal—the Fifth Circuit's standard governing stays seems unsupportable.

We would urge the Court to hold that on any *initial* application by a death-sentenced inmate for a stay of execution pending appeal, once a certificate of probable

cause has been issued, a stay should be granted unless it can be determined on the face of the available documents that the inmate's claims are frivolous, as we have defined that term. Any other standard will necessarily require courts of appeals, and this Court, to consume too much valuable time and energy in making fine distinctions about probable merit under emergency conditions, with inadequate records and little opportunity for reflection.

ARGUMENT

I. THE STANDARD APPARENTLY ADOPTED BY THE COURT OF APPEALS DEPARTS UNNECESSARILY FROM RELEVANT STATUTORY PROVISIONS, FROM THE STANDARDS EMPLOYED IN OTHER CIRCUITS, AND FROM PRIOR DECISIONS OF THIS COURT

A. The Fifth Circuit's Standard

The Fifth Circuit Court of Appeals appears to be uncertain as to the appropriate standard for staying a prisoner's execution in cases like this one. Beginning with *O'Bryan* v. *Estelle*, 691 F.2d 706, 708 (1982), the Fifth Circuit has employed the general standard for issuance of appellate stays in civil cases where there is no particular statute otherwise governing, such as 28 U.S.C. § 2251. This standard was derived from a suit challenging prison conditions. *See Ruiz* v. *Estelle*, 666 F.2d 854 (5th Cir. 1982). Although O'Bryan himself received a stay under this standard, two condemned inmates in subsequent cases were denied a stay in decisions applying the *O'Bryan* standard: *Brooks* v. *Estelle*, No. 82-1613 (5th Cir. Dec. 6, 1982), *stay and cert. denied*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982), and this case. In none of these cases did the Court of Appeals refer to 28 U.S.C. § 2251, the statute authorizing Courts of Appeals to stay execution pending disposition of an appeal. Prior to *O'Bryan*, however, the Fifth Circuit had routinely granted stays under Section 2251 to condemned prisoners who had been

granted a certificate of probable cause to prosecute their initial habeas appeal.[4]

In light of this uncertainty, this Court should establish a clear rule to guide the decisions of the Fifth Circuit, and other Courts of Appeals, in cases like this one. And for the answer to this question, this Court should examine the text, legislative history, and underlying policies of the pertinent statutes. *See Rose* v. *Lundy*, 455 U.S. 509, 515 (1982). To those factors, we now turn.

B. The Standard Under the Habeas Statutes

The inquiry into when a stay of execution pending disposition of a condemned prisoner's appeal must issue begins with the language of the pertinent statutes. *See, e.g., Sumner* v. *Mata*, 449 U.S. 539, 544-545 (1981). Two statutes are pertinent here.

Section 2251 of Title 28 authorizes "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending * * *" to "stay any proceeding

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[4] *See Bass* v. *Estelle* (5th Cir. Aug. 17, 1982), *motion to vacate stay denied sub nom. Estelle* v. *Bass*, 103 S.Ct. 36 (1982), *habeas relief denied*, 696 F.2d 1154 (1983); *Baldwin* v. *Maggio* (5th Cir. May 24, 1982); *Beavans* v. *Maggio* (5th Cir. Nov. 2, 1981); *Clark* v. *Maggio* (5th Cir. Nov. 2, 1981); *Baldwin* v. *Blackburn* (5th Cir. May 1981), *habeas relief denied*, 653 F.2d 942, *cert. denied*, 102 S. Ct. 2918 (1982); *Williams* v. *Blackburn* (5th Cir. Mar. 28, 1981), *habeas relief denied*, 649 F.2d 1019 (1981), *affirmed en banc sub nom. Williams* v. *Maggio*, 679 F.2d 381 (1982); *Gray* v. *Lucas* (5th Cir. Jan. 16, 1981), *habeas relief denied*, 677 F.2d 1086 (1982), *supplemented*, 685 F.2d 139 (1982); *Burns* v. *Estelle* (5th Cir. Sept. 27, 1978), *habeas relief granted*, 592 F.2d 1297 (1979), *aff'd en banc*, 623 F.2d 929 (1980), *cert. denied*, 450 U.S. 1001, 1014 (1981); *Jurek* v. *Estelle* (5th Cir. Feb. 28, 1978), *habeas relief granted*, 593 F.2d 672 (1979), *aff'd en banc*, 623 F.2d 929 (1980), *cert. denied*, 450 U.S. 1001, 1014 (1981); *Spinkellink* v. *Wainwright* (5th Cir. Sept. 6, 1977), *habeas relief denied*, 578 F.2d 582 (1978), *cert. denied*, 441 U.S. 976 (1979); *Brent* v. *White*, 398 F.2d 503, 507 (5th Cir. 1968), *cert. denied*, 393 U.S. 1123 (1969); *Clarke* v. *Grimes*, 374 F.2d 550, 553 (5th Cir. 1967); *Whitney* v. *Wainwright*, 339 F.2d 275 (5th Cir. 1964).

against the person detained * * * by or under the authority of any State for any matter involved in the habeas corpus proceeding." This statute clearly authorizes the federal courts to stay a condemned prisoner's execution. Section 2253 of Title 28 provides that "the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had," but that "[a]n appeal may not be taken * * * unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." [5] By its terms, Section 2253 is applicable to *any* prisoner, whether under a capital sentence or some lesser punishment, and imposes no precondition to appeal once a prisoner has obtained a certificate of probable cause. The plain meaning of this statute is that a prisoner, under any sentence, is entitled to appeal the denial of a petition for a writ of habeas corpus once he has obtained a certificate of probable cause to appeal. Because carrying out a capital sentence prior to the disposition of a condemned inmate's appeal will render his appeal legally (and literally) moot (*see Weinstein* v. *Bradford*, 423 U.S. 147 (1975) (per curiam)), the plain language of Section 2253 presupposes that a stay of execution will issue under Section 2251 of right whenever a condemned inmate obtains a certificate of probable cause to appeal.

The historical background to and legislative history of Sections 2251 and 2253 confirms the plain meaning of its text. Section 2251 traces its lineage to the Habeas Corpus Act of 1867, the first act empowering federal courts to issue a writ of habeas corpus for persons in state custody. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Section 1 of the Act authorized federal courts to issue a writ of

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[5] A panel of the Court of Appeals may also issue a certificate of probable cause. *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam) (answering certified questions); *Rogers* v. *Teets*, 350 U.S. 809 (1955) (per curiam); *Burwell* v. *Teets*, 350 U.S. 808 (1955) (per curiam).

habeas corpus for persons in state custody detained in violation of federal law, and also provided that any state court proceedings would be automatically stayed pending disposition of a party's habeas corpus petition. The last clause of Section 1 provided:

> [P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void. [14 Stat. 386 (codified at Revised Stat. § 766 (2d ed. 1878).]

This provision imposed an automatic, mandatory stay of execution pending full disposition of a condemned prisoner's petition for a writ of habeas corpus, as this Court recognized on numerous occasions. *See, e.g., Rogers* v. *Peck*, 199 U.S. 425, 436 (1905); *Lambert* v. *Barrett*, 159 U.S. 660, 662 (1895); *In re Shibuya Jugiro*, 140 U.S. 291, 295 (1891).[6]

In 1908, concerned with the rising tide of frivolous habeas corpus petitions challenging capital sentences which forestalled execution pending completion of the ap-

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[6] As the Court wrote in *Rogers* v. *Peck*:

> The object of this statute is apparent. It requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts, *In re Shibuya Jugiro*, 140 U.S. 291, and in no wise to interfere with the judgment if it shall result in a restoration of the petitioner's freedom when wrongfully imprisoned or restrained. The proceedings annulled are "against the person so imprisoned," etc. The statute aims to entirely prevent action which shall interfere with the perfect freedom of the Federal courts to inquire into the case and make such orders and render such judgment as they shall see fit. [199 U.S. at 436.]

pellate process, Congress amended Revised Statute § 766. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. This statute eliminated the automatic right to appeal the denial of a habeas corpus petition to this Court and inserted the requirement, now found at 28 U.S.C. § 2253, that a condemned inmate first obtain a certificate of probable cause to appeal before being able to do so. *See* H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908); 42 Cong. Rec. 608-609 (1908). Under this provision, this Court had no jurisdiction to hear an appeal in the absence of a certificate of probable cause. *House* v. *Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908) (per curiam); *Bilik* v. *Strassheim*, 212 U.S. 551 (1908) (per curiam). *See Davis* v. *Jacobs*, 454 U.S. 911, 916-917 (1981) (Rehnquist, J., joined by Burger, C.J., & Powell, J., dissenting from denial of cert. on jurisdictional grounds); *Jeffries* v. *Barksdale*, 453 U.S. 914, 915 (1981) (Rehnquist, J., joined by Burger, C.J., & Powell, J., dissenting from denial of cert. on jurisdictional grounds). In 1925, Congress extended the probable cause requirement "to appellate proceedings under this section as [it] heretofore ha[s] applied to direct appeals to the Supreme Court" (*see Jeffries* v. *Barksdale*, 453 U.S. at 915), as part of an overall modification of federal appellate jurisdiction. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940.[7] Congress did not, however, modify the requirement that a stay of execution issue during the disposition of an appeal that was supported by a certificate of probable cause. To the contrary, Section 6(d) also provided that "[t]he provisions of section[] * * * 766 of the Revised Statutes * * *" shall also apply to the Courts of Appeals. 43 Stat. 940.

Congress modified Revised Stat. § 766 in 1934 to eliminate its mandate that a stay of state court *trial* proceed-

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[7] Congress had also modified the Habeas Corpus Act in 1893 to impose a 6 month time period for taking an appeal. Act of Mar. 3, 1893, ch. 226, 27 Stat. 751.

ings issue automatically whenever a state defendant files a petition for habeas corpus before or during his *trial*. Act of June 19, 1934, ch. 673, 48 Stat. 1177. The legislative history of this amendment makes plain that it was designed solely to ensure that state criminal defendants could not disrupt state trial proceedings simply by filing a petition for habeas corpus. Nothing in the legislative history suggests that the 1934 Act was designed to permit a federal court to deny a condemned inmate a stay of execution pending disposition of his appeal where the inmate had obtained a certificate of probable cause. S. Rep. No. 1426, 73d Cong., 2d Sess. 1-3 (1934); H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1-2 (1934); 78 Cong. Rec. 12,366 (1934). In 1948, Congress revised Title 28 in its entirety, but did not make any substantive amendment to the provisions of Revised Stat. § 766.[8] The provisions regarding a stay of execution were codified at 28 U.S.C. § 2251, and the probable cause requirements were codified at 28 U.S.C. § 2253. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179, A180 (1947); Historical and Revision Notes following 28 U.S.C. §§ 2251 & 2253.

The legislative history therefore demonstrates that Congress intended a condemned prisoner to obtain a stay of execution, of right, pending the resolution of his appeal, once he had obtained a certificate of probable cause to appeal. Prior to 1908, a condemned prisoner obtained a stay of execution simply by filing a petition for a writ of habeas corpus. As this Court noted in *Lambert* v. *Barrett*, *supra*, "no order staying proceedings under state authority is made a condition to such stay[;] the bare pendency of an appeal has that effect * * *." 159 U.S. at 662. To prevent frivolous appeals from delaying the States' ability to impose capital sentences, Congress established the re-

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[8] Congress had amended the probable cause requirement in 1938 to add the second paragraph (pertaining to appeals from removals from state to federal court). Act of June 29, 1938, ch. 806, 52 Stat. 1232. That provision is not pertinent to this discussion.

quirement that a prisoner obtain a certificate of probable cause to appeal, first, to this Court and, later, to the federal Courts of Appeals. Congress did not, however, modify the provisions mandating a stay once a condemned inmate *had* obtained such a certificate, and later modified this provision only to ensure that a District Court had the discretion to deny a stay of a pending state *trial*, not execution. In other words, Congress in 1908 specifically considered the problem at issue in this case, and resolved that problem by imposing the probable cause requirement now found at 28 U.S.C. § 2253. Congress concluded that the decision as to whether a stay of execution pending disposition of a condemned prisoner's appeal should issue would be made when the District Court, circuit judge, or Court of Appeals makes the decision as to whether to issue a certificate of probable cause.

Where a certificate does issue, an appeal will follow and a stay must issue; where a certificate does not issue, there will be no appeal. Accordingly, a federal Court of Appeals should issue a stay of execution pending disposition of an appeal whenever a condemned prisoner obtains a certificate of probable cause. Because "the wisdom of such a modification in the law is for *Congress* to consider * * *" (*Brown* v. *Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J.) (emphasis supplied)), and it is the obligation of "*this Court* to give fair effect to the habeas corpus jurisdiction as enacted by Congress * * * (*id.* (emphasis supplied)), the court below erred by failing to grant Barefoot a stay of execution pending the complete resolution of his appeal.

This Court implied as much in *Nowakowski* v. *Maroney*, *supra*, when it summarily reversed the Third Circuit's dismissal of a habeas appeal following the grant of a certificate of probable cause:

> [W]hen a district judge grants such a certificate, the court of appeals *must grant an appeal in forma pauperis * * * and proceed* to a disposition of the

> appeal *in accord with its ordinary procedure.* [386 U.S. at 543; emphasis added.]

This could not be done in capital cases unless execution is stayed.

The Ninth Circuit long ago interpreted the relevant statutes in this fashion, addressing the precise question now before the Court. In *Fouquette* v. *Bernard*, 198 F.2d 96, 97 (1952), the "district court [had] denied Fouquette's motion for a stay of his execution [while granting a] * * * certificate of probable cause for the appeal." After reciting these facts, Chief Judge Denman granted Fouquette's application for a stay, holding that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute Fouquette pending its consideration." *See also* Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 And Habeas Corpus Cases*, 43 F.R.D. 343 (1967).

The Court of Appeals below rejected the logic of *Fouquette*, relying almost wholly upon this Court's order in *Brooks* v. *Estelle*, *supra*. Three members of this Court who dissented from the denial of a stay in *Brooks* argued there that a stay should be granted since the District Court had granted a certificate of probable cause. The court below in the instant case reasoned that since "six members of the Court denied [Brook's] petition for stay, this argument must have been rejected." The majority of this Court, however, simply did not address the dissent's argument in *Brooks*; the petitioner's application there appears to have been denied on other grounds.

Finally, there are two additional points that must be noted. The standard we propose here fully permits the Courts of Appeals to deny a prisoner a stay if his claims are *frivolous*. As this Court noted in *Lambert* v. *Barrett*, "[i]t is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be

interfered with on mere pretexts." 159 U.S. at 662. While the federal Courts of Appeals should give careful and calm consideration to a condemned prisoner's claims, the federal courts are under no constitutional obligation inexorably to expand substantive and procedural restraints upon the States' authority to carry out lawful sentences. Whether the issue is viewed in terms of issuance of a stay or a certificate of probable cause, federal appellate courts will, under the standard we propose, be able to deny a condemned prisoner a stay if his claims are frivolous. In addition, the standard we propose here, like the situation envisioned by Congress when it legislated Sections 2251 and 2253, deals only with a prisoner's *initial* application. Repetitive petitions, or other actions designed to disrupt the judicial process, are the worst type of "mere pretext[]" that this Court has already denounced. Both of these conclusions are consistent with the standard we support, and with "the policies underlying the statutory provisions[s]" (*Rose* v. *Lundy*, 455 U.S. at 517) relevant to this case.

C. The Standard in Other Circuits

To our knowledge, no other circuit court has adopted a standard for administering stays of execution similar to that currently applied by the Fifth Circuit. For example, in *Shaw* v. *Martin*, 613 F.2d 487 (1980), Judge Phillips of the Fourth Circuit, in granting a stay of execution to a capital inmate, described "appeal[s] in the United States Court of Appeals from the denial by the district court of a first petition for habeas corpus" as lying "within avenues of review so long and so well established that they must be counted among the basic 'protections' with which our system has 'surrounded' all persons convicted of crime." *Id.* at 491.[9] The Eighth Cir-

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[9] *See also Briley* v. *Hutto*, No. 81-6261 (4th Cir. Apr. 23, 1981) (continuing stay to capital inmate); *In re Shaw*, No. 81-1396 (4th

cuit has also either stayed or honored stays of executions of capital inmates pending initial habeas appeals,[10] as has the Ninth Circuit.[11]

The Eleventh Circuit has firmly adopted the position (i) that "[u]pon the issuance of the certificate [of probable cause], the petitioner ha[s] an absolute right to appeal the final order of the district court" (*Dobbert* v. *Strickland*, 670 F.2d 938, 939 (1982)), (ii) that such an appeal requires "[a] review on the merits" (*id.*, *citing Nowakowski* v. *Maroney*, *supra*), and (iii) that "[w]here the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence * * * a stay should be granted." *Id.* at 940. In *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982), Chief Judge Godbold made it plain that, in the Eleventh Circuit's view, when an appeal

> is properly presented to us—as it is in this case, by assertion of non-frivolous issues that are not foreclosed by the state court processes—the law requires us to [grant a stay and] examine to see whether his trial and appeal did measure up to constitutional standards. [*Id.* at 942.] [12]

Cir. May 15, 1981) (granting stay to capital inmate); *Barfield* v. *Harris*, No. 82-6424 (4th Cir.) (staying initial habeas appeal).

[10] *See Holtan* v. *Parratt*, No. 81-2153 (8th Cir.) *remanded*, 683 F.2d 1163 (8th Cir. 1982); *Collins* v. *Lockhart*, No. 82-1769 (8th Cir. argued Dec. 17, 1982); *Pickens* v. *Lockhart*, No. 82-1836-EA (8th Cir. argued Feb. 2, 1982).

[11] *See Harris* v. *Pulley*, No. 82-5247 (9th Cir.), *remanded*, 692 F.2d 1189 (1982), *pet. for cert. filed*, 51 U.S.L.W. 3512 (U.S. Dec. 29, 1982) (No. 82-1095).

[12] Consistent with this standard, the Eleventh Circuit has routinely granted stays of execution to consider initial habeas appeals in capital cases. *See, e.g.*, *Shriner* v. *Wainwright*, No. 82-5469 (11th Cir. Apr. 20, 1982); *Booker* v. *Wainwright*, No. 82-5468 (11th Cir. Apr. 20, 1982); *Mulligan* v. *Zant*, No. 8027 (11th Cir. Jan. 20, 1982).

This virtually uniform approach in Courts of Appeals outside the Fifth Circuit is consonant with the great attention to procedural fairness that has long marked this Court's own approach to the issuance of stays in capital cases.[13]

In sum, the standard we support is more clearly in line with the statutes and the precedents which have heretofore governed issuance of stays in capital cases than the one apparently adopted by the Fifth Circuit. We will next consider the applicable policy considerations.

II. ANY STANDARD OTHER THAN THE ONE PROPOSED HERE WILL (i) NEEDLESSLY COMPLICATE THE ORDERLY ADMINISTRATION OF JUSTICE, (ii) SERIOUSLY COMPROMISE THE QUALITY OF DEFENSE REPRESENTATION, AND (iii) RISK UNFAIRNESS TO CAPITAL INMATES, WITHOUT SERVING ANY STRONG COUNTERVAILING STATE INTERESTS

Any standard other than the one we propose will, we believe, affect adversely the entire process of federal review of capital cases. Dozens of habeas corpus appeals in the Fifth Circuit will hereafter be reviewed initially

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[13] *See, e.g., Lenhard* v. *Wolff*, 443 U.S. 1306 (1979) (Rehnquist, J., granting stay pending further proceedings); *Evans* v. *Bennett*, 440 U.S. 1301 (1979) (Rehnquist, J., granting stay pending further proceedings); *Ex parte Stickney*, 82 S. Ct. 465 (1965) (Douglas, J., granting stay of Texas inmate after habeas appeal pending review of petition for certiorari); *La Marca* v. *New York*, 78 S. Ct. 106 (1957) (Harlan, J., "[a]s I cannot deem it unreasonable to think that a federal question meriting consideration may be found, * * * I consider it my duty to afford petitioner an opportunity to present his petition * * *"); *Edwards* v. *New York*, 76 S. Ct. 538 (1956) (Harlan, J., although "[t]he petitioner's papers, and the record * * * leave me in grave doubt, to say the least, as to whether petitioner's conviction presents any substantial federal question, * * * [n]evertheless, this being a capital case, I am constrained to give petitioner a reasonable opportunity to petition for a writ of certiorari * * *.").

under emergency timetables imposed by approaching state execution dates. Under such schedules, all participants in the review process—judges, clerks, litigants and attorneys—will be required to set aside other responsibilities in order to participate in life-or-death decisions on whether to afford capital inmates full appellate review, or no review at all. Federal judges must assess the "likelihood of success" of difficult, often novel, constitutional questions, without sufficient time for careful reflection, perhaps without even the opportunity to review lower court records.

Petitioner's own case is illustrative. His three-judge appellate panel, hastily assembled, was presented with a motion for a stay on Friday, January 14th, received petitioner's 1400-page trial transcript and his 260-page federal evidentiary transcript only the following Wednesday, heard oral arguments from counsel the same day, and rendered a sixteen-page opinion twenty-six hours later. The utmost good faith and diligence on the part of the participating judges does not eliminate the risk of oversight or misunderstanding. The Court must ask itself whether such breathtaking expedition in such an important matter can adequately assure both the substance and the appearance of justice in capital cases.

In considering this question, the Court needs be mindful that the disruption of the appellate system occasioned by such expedited review will become increasingly more frequent in years to come. Over 225 capital inmates now crowd Death Rows within the Fifth Circuit, and many of their cases could well follow a similar scenario. While such emergencies will thus become increasingly frequent, we anticipate that they will never become very predictable. Some inmates will obtain stays from District Courts. In other cases, even without formal stays of execution, state courts or executives will simply not set

execution dates. In anticipation of the unforeseeable number of inmates who will face unstayed dates, however, the Court of Appeals will be required to stand ever ready to set aside normal business and invoke emergency procedures.

As this Court undoubtedly recognizes, the burdens of this change in stay standards will be certain to fall, not merely on the Court of Appeals, but on this Court as well. Denial of a stay by the Court of Appeals necessarily will propel each capital inmate—on a foreshortened schedule, with execution imminent—directly to this Court for a final plea for a hearing on the merits of his constitutional claims. This Court will likely be afforded, not the comparative luxury of months or weeks, but merely a few hours or days at most, in which to examine the parties' applications, review the trial and appellate records, evaluate the lower courts opinions, and reach a decision.

In recent years, members of this Court have justifiably directed the attention of the bar and the general public to the increased strains imposed upon the Court by its growing caseload.[14] Faced with other pressing demands on its energy and attention, the Court can ill afford as a matter of judicial administration to take upon itself in coming years the additional responsibility to conduct overnight review of Courts of Appeals' decisions in scores of cases, with life or death hanging in the balance. As an alternative, the certiorari process, after normal

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[14] *See, e.g.*, Washington Post, Feb. 7, 1983, § 1, at A1 (Chief Justice Burger and Justice O'Connor); *id.*, Sept. 24, 1982, § 1, at A3 (Justice Rehnquist); *id.*, Sept. 11, 1982, § 1 at A3 (Justice Marshall); *id.*, Sept. 10, 1982, § 1, at A2 (Justice Brennan); *id.*, Aug. 10, 1982, § 1, at A11 (Justice Powell); *id.*, Aug. 10, 1982, § 1, at A6 (Justice White); *id.*, Aug. 7, 1982, § 1, at A3 (Justice Stevens).

federal appellate review, provides this Court with a far more reasonable and manageable means to evaluate a capital inmate's final appeal than any hurried, pressured review under the threat of imminent execution.

A more careful and orderly approach to the issuance of stays of execution serves the needs of others beside the courts and administrative personnel. One of the major empirical assumptions of the Fifth Circuit's system of expedited judicial review appears to be that capital offense attorneys can somehow render adequate assistance to their clients under these emergency review conditions. We would certainly not impute to the Court of Appeals an indifference to the question of attorney assistance on appeal. Yet we believe that, in fact, capital inmates and their attorneys will suffer seriously from the Court of Appeals' new system. Most capital proceedings in District Courts within the Fifth Circuit are currently being handled by unpaid, volunteer attorneys, many of them solo practitioners without extensive support services and research facilities.[15] Adoption of summary stay procedures will place an enormous financial burden on these attorneys—for the rapid reproduction of documents, for overnight delivery services, for trips to hastily convened oral arguments—and may disrupt for weeks at a time the attorneys' other practice.

Apart from financial and personal burdens to be placed on counsel, summary procedures will inevitably seriously constrict the time available for research and writing on the constitutional claims at issue. Since a District Court's opinion often sets the agenda for appellate review, only

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[15] As the Court knows, several larger organizations opposed to capital punishment have been involved in many of the early cases which have reached the circuit courts on federal habeas review. The burgeoning number of capital cases and the limited resources of these organizations makes it unlikely that, in the future, most capital litigants and their attorneys can draw upon these organizations for financial support or expert legal assistance.

a limited amount of work can be done by counsel before an opinion is rendered. In addition, many attorneys in capital cases are not fully familiar with the intricacies of federal appellate procedures or the nuances of complex constitutional issues. Clients may well risk losing their cases, and their lives, simply because their attorneys will not, under expedited procedures, have sufficient time to pursue their cases in conformance with appellate rules or relevant constitutional decisions. In short, truncated appellate procedures will, we believe, materially and adversely influence the quality and scope of defense assistance rendered to capital inmates.

This impairment of defense counsel's ability to assist their capital clients also impinges upon the considerations of fairness this Court has articulated in capital cases. The Court has long and properly insisted that capital cases be surrounded by the strictest standards to ensure procedural fairness. *See, e.g., Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) ("there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment"); *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977); *Lockett* v. *Ohio*, 438 U.S. 586, 603-604 (1978); *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980); *Eddings* v. *Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). In light of this wise and consistent precedent, it is difficult to justify appellate procedures affording greater protection on habeas appeal for minor felons than for those convicted of first degree offenses and sentenced to death. Yet that is precisely the impact of the Court of Appeals' stay procedures, which would permit a petty thief, challenging his conviction in the Court of Appeals, a far greater procedural opportunity to secure reversal—including a full opening brief, a reply brief, and an oral argument if deemed necessary—than a capital defendant possessing a certificate of probable cause to ap-

peal. If rules which provide for full briefing and argument are deemed generally useful or significant in obtaining fair and careful review of lesser criminal appeals, we can think of no valid constitutional considerations which would require *fewer* procedural protections to be afforded capital defendants, at least on their initial federal habeas appeals.[16]

We can identify no adequate countervailing interests supporting the Fifth Circuit's standard. Attorneys General of several states have naturally indicated their desire, on behalf of citizens in their respective states, to carry out executions that have been ordered by their state courts. Yet it seems obvious that executions are soon to resume in earnest in this country, whether or not full federal appellate review is required. Granting stays to capital inmates on appeal will do little to retard this development. Although individual inmates will have their respective executions postponed for the minimum time needed to obtain appellate review, once a sufficient number of cases within the Fifth Circuit has completed this review process, the total number and frequency of executions will be affected by the allowance of a full review process only if, and insofar as, the Courts of Appeals discover fundamental constitutional errors, after full briefings and argument, that might have been overlooked had review been limited to summary stay procedures. The States surely can have no legitimate interest in expeditious procedures *solely because* their expedition might make identification and redress of constitutional violations more difficult. No one, in short, can validly

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[16] We repeat that nothing in our submission to this Court is meant to suggest that the federal courts should be denied the procedural means to dispose summarily of frivolous or repetitive petitions submitted by condemned prisoners merely to delay their executions.

oppose normal review procedures because of the prospect that they will uncover too many constitutional errors.

Moreover, we would hope that this Court would specifically condemn expedited treatment in cases such as this one. The reason is threefold. First, this would be the petitioner's initial federal appeal. Secondly, the District Court would have already determined that there was sufficient merit in his claims to warrant the issuance of a certificate of probable cause. Finally, the Court of Appeals would have made a preliminary determination that the claims were nonfrivolous on their face. Given these facts, and the further crucial consideration that these are death cases, we submit that only a full, normal, untruncated appellate review would be justified.

But if this Court concludes that the Courts of Appeals should be permitted to dispose of these appeals on an expedited basis, we submit that the Courts of Appeals should first adopt such procedures as part of their local rules, rather than follow such a route on an ad hoc basis. *See In re Burwell*, 350 U.S. at 522. By so doing, everyone concerned will have notice of the manner by which appeals will be resolved, and will be able best to prepare for an appeal once a District Court has denied a petition and the notice of appeal has been lodged in the District Court. Otherwise, counsel will not be able to gauge how to prepare a client's appeal, and the Courts of Appeals will not be able to gather the records and other materials necessary for a full appraisal of a prisoner's claims.

In sum, any stay procedures other than the one we suggest will inevitably cast serious and unjustifiable new burdens on the Court of Appeals itself, on this Court, and on capital defendants within the Fifth Circuit. Those burdens are not warranted by considerations of judicial administration and policy, and no legitimate considerations argue in favor of any other standard.

III. THE COURT SHOULD ADOPT A STANDARD UNDER WHICH THE STAYS OF EXECUTION WILL BE GRANTED TO CAPITAL INMATES UPON THEIR *INITIAL* FEDERAL APPEAL UNLESS THE CONSTITUTIONAL CLAIMS THEY PRESENT ARE LEGALLY FRIVOLOUS

As an appropriate alternative to the Fifth Circuit's stay standard, we recommend to this Court the standard adopted by the Eleventh Circuit in *Goode* v. *Wainwright*, *supra*, under which a circuit court must grant stays of a capital inmate's initial habeas appeal if the petitioner has asserted "nonfrivolous issues" (670 F.2d at 943), which have not indisputably been waived by petitioner's failure to comply with state court procedures. *See Dobbert* v. *Strickland*, *supra*, 670 F.2d at 940.

"Nonfrivolous issues," we believe, should be defined to encompass any federal constitutional claims that are not squarely contrary to recent decisions of this Court,[17] that are not refuted, as a matter of fact, solely from a review of the records, or that are obviously and wholly without merit even if supported by the record. This standard would allow judgments to be made rapidly by the appellate courts, with a minimum of disruption to the ordinary functioning of the judicial process. Any higher standard, however, would necessarily require just the sort of intensive, time-consuming legal evaluation that is a principal administrative flaw with the Fifth Circuit's current procedures.

The issue here must be viewed in tandem with the standard governing issuance of a certificate of probable

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[17] A standard which would exclude apellate reconsideration of claims arguably contrary to *any* prior decisions of this Court would be unwarranted in light of broad changes that have occurred in the criminal law, especially the law governing capital cases, during the past two decades. *See, e.g., Gardner* v. *Florida*, 430 U.S. at 355-58 (distinguishing *Williams* v. *New York*, 337 U.S. 241 (1949); *Bullington* v. *Missouri*, 451 U.S. 430 (1981) (distinguishing *Stroud* v. *United States*, 251 U.S. 15 (1919)).

cause to appeal, under which a petitioner must make a "substantial showing of the denial of [a] federal right." *Stewart* v. *Beto*, 454 F.2d at 270 n.2; *see also Jeffries* v. *Barksdale*, 453 U.S. at 914 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari on jurisdictional grounds, and citing *United States ex rel. Tillery* v. *Carel*, 294 F.2d 12, 14-15 (3d Cir. 1961), for the proposition that 28 U.S.C. § 2253 seeks to bar "frivolous" appeals). Under these cases, we fully expect that very few capital inmates who have obtained a certificate will thereafter be denied stays of execution pending an initial habeas appeal. This seems the preferable course under the statutes and precedents which govern habeas corpus appeals and, indeed, under our system of justice generally. All parties can be more confident that capital sentences in this country are being fairly and justly carried out if executions do not take place amid a flurry of last-minute legal proceedings, requiring hasty judgments from federal judges under pressure to render overnight decisions. An orderly appellate review process should serve the vitally important function of assuring "to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason." *Gardner* v. *Florida*, 430 U.S. at 358. As *amicus curiae*, we urge the Court to adopt a standard for the issuance of stays of execution that will once again make this careful and orderly appellate review process possible.

CONCLUSION

The Court should adopt the standard governing stays of execution set forth in this brief.

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Respectfully submitted,

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